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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **Abante Rooter & Plumbing,
 15 Individually and on Behalf of All
 16 Others Similarly Situated,**

17 **Plaintiff,**

18 **v.**

19 **Sears Brand, LLC, d/b/a Sears
 20 Home Improvement d/b/a Sears
 21 Home Services,**

22 **Defendant.**

23 **Case No.:**

24 **CLASS ACTION**

25 **CLASS ACTION COMPLAINT
 26 FOR DAMAGES AND
 27 INJUNCTIVE RELIEF
 28 PURSUANT TO THE
 TELEPHONE CONSUMER
 PROTECTION ACT, 47 U.S.C. §
 227 ET SEQ.**

29 **Jury Trial Demanded**

30 **INTRODUCTION**

31 1. Abante Rooter & Plumbing (referred to as "Plaintiff"), brings this class
 32 action for damages, injunctive relief, and any other available legal or
 33 equitable remedies, resulting from the illegal actions of Sears Brand, LLC, d/
 34 b/a Sears Home Improvement d/b/a Sears Home Services (referred to as



1 “Defendant”), in negligently, knowingly, and/or willfully contacting Plaintiff
2 on Plaintiff’s cellular telephones, in violation of the Telephone Consumer
3 Protection Act, 47 U.S.C. § 227, et seq., (“TCPA”), thereby invading
4 Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to
5 itself own acts and experiences of its employees, agents and representatives,
6 and, as to all other matters, upon information and belief, including
7 investigation conducted by Plaintiff’s attorneys.

8 2. The TCPA was designed to prevent calls and messages like the one described
9 within this complaint, and to protect the privacy of citizens like Plaintiff.
10 “Voluminous consumer complaints about abuses of telephone technology –
11 for example, computerized calls dispatched to private homes – prompted
12 Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740,
13 744 (2012).

14 3. In enacting the TCPA, Congress intended to give consumers a choice as to
15 how creditors and telemarketers may call them, and made specific findings
16 that “[t]echnologies that might allow consumers to avoid receiving such calls
17 are not universally available, are costly, are unlikely to be enforced, or place
18 an inordinate burden on the consumer.” TCPA, Pub.L. No. 102-243, § 11.
19 Toward this end, Congress found that:

20 Banning such automated or prerecorded telephone calls to the
21 home, except when the receiving party consents to receiving the
22 call or when such calls are necessary in an emergency situation
23 affecting the health and safety of the consumer, is the only
24 effective means of protecting telephone consumers from this
nuisance and privacy invasion.

25 *Id.* at § 12; *see also, Martin v. Leading Edge Recovery Solutions, LLC*, 2012
26 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012) (citing Congressional finding
27 on TCPA’s purpose).

- 1 4. Congress also specifically found that “the evidence presented to the Congress
- 2 indicates that automated or prerecorded calls are a nuisance and an invasion
- 3 of privacy, regardless of the type of call [...].” *Id.* At §§ 12-13. *See also,*
- 4 *Mims*, 132 S. Ct. at 744.
- 5 5. As Judge Easterbrook of the Seventh Circuit explained in a TCPA case
- 6 regarding calls to a non-debtor similar to this one:

7 The Telephone Consumer Protection Act [...] is well known for its
8 provisions limiting junk-fax transmissions. A less litigated part of
9 the Act curtails the use of automated dialers and prerecorded
10 messages to cell phones, whose subscribers often are billed by the
11 minute as soon as the call is answered – and routing a call to
12 voicemail counts as answering the call. An automated call to a
landline phone can be an annoyance; an automated call to a cell
phone adds expense to annoyance.

13 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012).

15 JURISDICTION AND VENUE

- 16 6. Jurisdiction is proper under 47 U.S.C §227(b); *Mims v. Arrow Fin. Servs.,*
- 17 *LLC*, 132 S.Ct. 740 (2012), because Plaintiff alleges violations of federal law.
- 18 7. Venue is proper in the United States District Court for the Northern District of
- 19 California pursuant to 18 U.S.C. § 1391(b) because Plaintiff’s principal place
- 20 of business is in Emeryville, CA, the events giving rise to Plaintiff’s causes of
- 21 action against Defendant occurred in the State of California within the
- 22 Northern District of California (in or around Emeryville CA) and Defendant
- 23 conducts business in the area in Emeryville, San Francisco, Oakland, Santa
- 24 Cruz, and other counties within the Northern District.

25 PARTIES

- 26 8. Plaintiff is, and at all times mentioned herein was, a individual citizen and
- 27 resident of the County of Alameda, in the State of California, who received
- 28 the telephone calls which are subject of this complaint.

1 9. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and
2 at all times mentioned herein was, an individual and a “person,” as defined by
3 47 U.S.C. § 153 (39).

4 10. Plaintiff is informed and believes, and thereon alleges, that Defendant is an
5 Illinois Limited Liability Company, with headquarters in Hoffman Estates,
6 Illinois. Plaintiff is informed and believes, and thereon alleges, that at all
7 relevant times, Defendant conducted business in the State of California, and
8 within this judicial district.

9

10 **FACTUAL ALLEGATIONS**

11 11. At all times relevant, Plaintiff is, and at all times mentioned herein was, a
12 California corporation, and therefore, a “person” as defined by 47 U.S.C. §
13 153 (39).

14 12. Defendant is, and at all times mentioned herein was, a “person” as defined by
15 47 U.S.C. § 153 (39).

16 13. Sometime prior to January 1, 2016, Plaintiff was assigned, and became the
17 owner of, a cellular telephone number from its wireless provider, with a
18 number ending in “3803.”

19 14. On or about January 1, 2016, at 6:20 PM, Plaintiff received a call on its
20 cellular telephone from Defendant to a number ending in “3803”, in which
21 Defendant utilized an automatic telephone dialing system (“ATDS”) as
22 defined by 47 U.S.C. § 227(a)(1), and prohibited by 47 U.S.C. § 227(b)(1)
23 (A).

24 15. The call to Plaintiff’s cellular telephone number was from a number
25 (405)-421-0331.

26 16. Plaintiff answered the phone, and after a prolonged delay he was connected to
27 a representative, who offered Plaintiff to replace windows.



1 17. At no time did Plaintiff have any relationship with Defendant, provided
2 Defendant with its number or a written consent to make a solicitation call to
3 the business cellular number.

4 18. On or about January 6, 2016, Defendant called again, from a different number
5 209-676-3446 and inquired if Plaintiff was interested in replacing windows.

6 19. On January 6, 2016, Defendant called from (800)749-7499 called again
7 confirming that it was contacted by Plaintiff, even though no such contact was
8 made.

9 20. Defendant also sent an email on January 6, 2016, offering its services and
10 products and soliciting Plaintiff to schedule a free consultation.

11 21. Defendant continued placing its unlawful marketing calls to Plaintiff's
12 cellular number on January 7, 2016 at 9:03 am, 1:12 pm, and 6:57 pm from
13 the telephone number 800-749-7499.

14 22. During one of the telephone conversations Plaintiff requested that Defendant
15 takes Plaintiff's phone number off Defendant's dial list.

16 23. On January 8, 2016, Defendant's agent also emailed to Plaintiff to confirm
17 that Defendant received Plaintiff's request for Defendant to cease its
18 telephone calls to Plaintiff's cellular number.

19 24. Despite Plaintiff's express request for Defendant to cease all of its telephonic
20 communication, Defendant then called again on January 12 and January 13,
21 2016 from the number 405-421-0331.

22 25. Based on information and belief, Plaintiff alleges that all calls referenced
23 above came from Defendant.

24 26. All Defendant's telephone calls to Plaintiff's cellular number were for
25 marketing purposes as Defendant was trying to sell Plaintiff services and
26 products. Plaintiff has no business relationship with Defendant.



1 27. When consumers return the call on 1-800-749-7499, a standard message plays
2 the following recording: “Thank you for choosing Sears your call may be
3 monitored or recorded for quality assurances.”

4 28. After the message is finished playing, an individual is then connected to a live
5 representative after a short delay.

6 29. Upon information and belief, the ATDS used by Defendant has the capacity
7 to store or produce telephone numbers to be called, using a random or
8 sequential number generator.

9 30. The ATDS used by Defendant also has the capacity to, and does, call
10 telephone numbers from a list of databases of telephone numbers
11 automatically and without human intervention.

12 31. The telephone number Defendant called was assigned to a cellular telephone
13 service for which Plaintiff incurred a charge for incoming calls pursuant to 47
14 U.S.C. § 227 (b)(1).

15 32. Plaintiff at no time provided “prior express consent,” written or otherwise, for
16 Defendant to place telephone calls to Plaintiff’s cellular telephone utilizing an
17 ATDS as proscribed under 47 U.S.C. § 227(b)(1)(A).

18 33. Plaintiff had not provided its cellular telephone number to Defendant.
19 Plaintiff was not a customer of Defendant. Plaintiff had no “established
20 business relationship” with Defendant, as defined by 47 U.S.C. § 227 (a)(2).

21 34. These telephone calls made by Defendant were in violation of 47 U.S.C. §
22 227(b)(1).

23 **STANDING**

24 35. Standing is proper under Article III of the Constitution of the United States of
25 America because Plaintiff’s claims state:
26 a. a valid injury in fact;
27 b. which is traceable to the conduct of Defendant ;
28 c. and is likely to be redressed by a favorable judicial decision.

1 See, *Spokeo, Inc. v. Robins*, 578 U.S. ____ (2016) at 6, and *Lujan v.*
2 *Defenders of Wildlife*, 504 U.S. 555 at 560.

3 36. In order to meet the standard laid out in *Spokeo* and *Lujan*, Plaintiff must
4 clearly allege facts demonstrating all three prongs above.

5

6 **A. *The “Injury in Fact” Prong***

7 37. Plaintiff’s injury in fact must be both “concrete” and “particularized” in order
8 to satisfy the requirements of Article III of the Constitution, as laid out in
9 *Spokeo* (*Id.*).

10 38. For an injury to be “concrete” it must be a *de facto* injury, meaning that it
11 actually exists. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638
12 (7th Cir. 2012). In the present case, Plaintiff was called on its cellular phone
13 by Defendant, who utilized an ATDS. Such calls are a nuisance, an invasion
14 of privacy, and an expense to Plaintiff. All three of these injuries are concrete
15 and *de facto*.

16 39. For an injury to be “particularized” means that the injury must “affect the
17 Plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 578 U.S.
18 ____ (2016) at 7. In the instant case, it was Plaintiff’s phone that was called
19 and Plaintiff’s employees/agents were distracted from work and compelled to
20 answer the calls. It was Plaintiff’s and Plaintiff’s employees privacy and
21 peace that was invaded by Defendant’s call, that was delivered using an
22 ATDS. Finally, Plaintiff alone is responsible to pay the bill on its cellular
23 phone. All of these injuries are particularized and specific to Plaintiff, and
24 will be the same injuries suffered by each member of the putative class.

25

26 **B. *The “Traceable to the Conduct of Defendant” Prong***

27

28



1 40. The second prong required to establish standing at the pleadings phase is that
2 Plaintiff must allege facts to show that its injuries are traceable to the conduct
3 of Defendant(s).

4 41. In the instant case, this prong is met simply by the fact that the message was
5 delivered to Plaintiff's cellular phone directly by Defendant, or by
6 Defendant's agent at the direction of Defendant.

7

8 ***C. The "Injury is Likely to be Redressed by a Favorable Judicial Opinion"***
9 ***Prong***

10 42. The third prong to establish standing at the pleadings phase requires Plaintiff
11 to allege facts to show that the injury is likely to be redressed by a favorable
12 judicial opinion.

13 43. In the present case, Plaintiff's Prayers for Relief include a request for
14 damages for each call made by Defendant, as authorized by statute in 47
15 U.S.C. § 227. The statutory damages were set by Congress and specifically
16 redress the financial damages suffered by Plaintiff and the members of the
17 putative class.

18 44. Furthermore, Plaintiff's Prayers for Relief request injunctive relief to restrain
19 Defendant from the alleged abusive practices in the future. The award of
20 monetary damages and the order for injunctive relief redress the injuries of
21 the past, and prevent further injury in the future.

22 45. Because all standing requirements of Article III of the U.S. Constitution have
23 been met, as laid out in *Spokeo, Inc. v. Robins*, 578 U.S. ____ (2016), Plaintiff
24 has standing to sue Defendant on the stated claims.

25

26

27 **CLASS ACTION ALLEGATIONS**

28

1 46. Plaintiff brings this action on behalf of itself and on behalf of all others
2 similarly situated (“the Class”).
3 47. Plaintiff represents, and is a member of, the Class, consisting of:

4
5 All persons within the United States who had or have a number
6 assigned to a cellular telephone service, who received at least one
7 telephone call using an ATDS from Defendant, or their agents calling on
8 behalf of Defendant, between the date of filing this action and the four
9 years preceding, where such calls were placed for the purpose of
10 marketing, to non-customers of Defendant, at the time of the calls.

11
12 48. Defendant and their employees or agents are excluded from the Class.
13 Plaintiff does not know the number of members in the Class, but believes the
14 Class members number in the thousands, if not more. Thus, this matter
15 should be certified as a Class action to assist in the expeditious litigation of
16 this matter.
17 49. Plaintiff and members of the Class were harmed by the acts of Defendant in
18 at least the following ways: Defendant illegally contacted Plaintiff and the
19 Class members via their cellular telephones thereby causing Plaintiff and the
20 Class members to incur certain cellular telephone charges or reduce cellular
21 telephone time for which Plaintiff and the Class members previously paid, by
22 having to retrieve or administer messages left by Defendant or its agents,
23 during those illegal calls, and invading the privacy of said Plaintiff and the
24 Class members. Plaintiff and the Class members were damaged thereby.
25 50. This suit seeks only damages and injunctive relief for recovery of economic
26 injury on behalf of the Class and it expressly is not intended to request any
27 recovery for personal injury and claims related thereto. Plaintiff reserves the
28 right to expand the Class definition to seek recovery on behalf of additional

1 persons as warranted as facts are learned in further investigation and
2 discovery.

3 51. The joinder of the Class members is impractical and the disposition of their
4 claims in the Class action will provide substantial benefits both to the parties
5 and to the Court. The Class can be identified through Defendant's records
6 and/or Defendant's agent's records.

7 52. There is a well-defined community of interest in the questions of law and fact
8 involved affecting the parties to be represented. The questions of law and fact
9 to the Class predominate over questions which may affect individual Class
10 members, including the following:

11 i. Whether, within the four years prior to the filing of the
12 Complaint, Defendant made any call(s) (other than a call made
13 for emergency purposes or made with the prior express consent
14 of the called party) to the Class members using any ATDS to any
15 telephone number assigned to a cellular telephone service;

16 ii. Whether Defendant called non-customers of Defendant for
17 marketing purposes;

18 iii. Whether Plaintiff and the Class members were damaged thereby,
19 and the extent of damages for such violation(s); and

20 iv. Whether Defendant should be enjoined from engaging in such
21 conduct in the future.

22 53. As a person who received calls from Defendant in which Defendant used an
23 ATDS, without Plaintiff's prior express consent and a written consent,
24 Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly
25 and adequately represent and protect the interests of the Class in that Plaintiff
26 has no interests antagonistic to any member of the Class.

27 54. Plaintiff and the members of the Class have all suffered irreparable harm as a
28 result of the Defendant's unlawful and wrongful conduct. Absent a class

1 action, the Class will continue to face the potential for irreparable harm. In
2 addition, these violations of law will be allowed to proceed without remedy
3 and Defendant will likely continue such illegal conduct. The size of Class
4 member's individual claims causes, few, if any, Class members to be able to
5 afford to seek legal redress for the wrongs complained of herein.

6 55. Plaintiff has retained counsel experienced in handling class action claims and
7 claims involving violations of the Telephone Consumer Protection Act.

8 56. A class action is a superior method for the fair and efficient adjudication of
9 this controversy. Class-wide damages are essential to induce Defendant to
10 comply with federal and California law. The interest of Class members in
11 individually controlling the prosecution of separate claims against Defendant
12 is small because the maximum statutory damages in an individual action for
13 violation of privacy are minimal. Management of these claims is likely to
14 present significantly fewer difficulties than those that would be presented in
15 numerous individual claims.

16 57. Defendant has acted on grounds generally applicable to the Class, thereby
17 making appropriate final injunctive relief and corresponding declaratory relief
18 with respect to the Class as a whole.

19
FIRST CAUSE OF ACTION:
20 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER**
21 **PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

22 58. Plaintiff incorporates by reference all of the above paragraphs of this
23 Complaint as though fully stated herein.

24 59. The foregoing acts and omissions of Defendant constitutes multiple negligent
25 violations of the TCPA, including but not limited to each and every one of the
26 above-cited provisions of 47 U.S.C. § 227 et seq.



1 60. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq.,
2 Plaintiff and the Class are entitled to an award of \$500.00 in statutory
3 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
4 61. Plaintiff and the Class are also entitled to and seek injunctive relief
5 prohibiting such conduct in the future.

6 **SECOND CAUSE OF ACTION:**

7 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE
CONSUMER PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

8 62. Plaintiff incorporates by reference all of the above paragraphs of this
9 Complaint as though fully stated herein.
10 63. The foregoing acts and omissions of Defendant constitute multiple knowing
11 and/or willful violations of the TCPA, including but not limited to each and
12 every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
13 64. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §
14 227 et seq., Plaintiff and each of the Class are entitled to treble damages, as
15 provided by statute, up to \$1,500.00, for each and every violation, pursuant to
16 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
17 65. Plaintiff and the Class are also entitled to and seek injunctive relief
18 prohibiting such conduct in the future.

19 **PRAYER FOR RELIEF**

20 66. Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the
21 Class members the following relief against Defendant:
22

23 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
24 THE TCPA, 47 U.S.C. § 227 ET SEQ.**

25 67. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1),
26 Plaintiff seeks for itself and each Class member \$500.00 in statutory damages,
27 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
28



1 68. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
2 conduct in the future.
3 69. Any other relief the Court may deem just and proper.

4 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL
5 VIOLATION
6 OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

7 70. As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §
8 227(b)(1), Plaintiff seeks for itself and each Class member treble damages, as
9 provided by statute, up to \$1,500.00 for each and every violation, pursuant to
10 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
11 71. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
12 conduct in the future.
13 72. Any other relief the Court may deem just and proper.

14 **TRIAL BY JURY**

15 73. Pursuant to the seventh amendment to the Constitution of the United States of
16 America, Plaintiff is entitled to, and demands, a trial by jury.

17
18 Respectfully submitted,

19 Date: June 7, 2017

20 **HYDE & SWIGART**

21
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